

# ESTATE PLANNING AND CONFLICT OF LAWS

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Because of the ease with which people and property move from one state to another and the fact that a client may conduct his affairs with little regard for state lines, an estate planner must be acutely aware of conflict of laws problems. Unfortunately, the result of poor conflict of laws planning may be substantial distortion of the testator's expressed intent or unnecessary depletion of assets which would otherwise be available for the objects of the testator's bounty. It is normally impossible to completely avoid such possibilities. However, as our society has become progressively more ambulatory, the courts have realized that inflexible or ethnocentric conflict of laws rules are frequently inadequate to cope with the multitude of problems which may arise when an estate has contacts with more than one jurisdiction. In many instances, traditional conflicts notions have been modified so as to provide sufficient flexibility to enable the forum to select a favorable law, thereby reducing the possibility of frustrating the testator's obvious intent because of an arbitrary conflict of laws rule. As a result, an estate planner is given a significant degree of control over conflicts problems, and the primary purpose of this article shall be to select a sampling of areas where such control might be effective.

## TRUSTS

Since an inter vivos trust of movables is obviously a conveyance of property, the courts might limit themselves to the conflict of laws rules normally applied in regard to inter vivos transfers of movables.<sup>1</sup> However, because of the force of the policy recognizing the settlor's intent as controlling in most matters, the conflict of laws rules relating to trusts have developed to the point where the validity of an inter vivos trust of movables may be governed by the law of the state designated in the trust instrument, unless the law selected violates some strong public policy at the situs.<sup>2</sup> If there is no law designated in the instru-

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<sup>1</sup> See, e.g., *Warner v. Florida Bank & Trust Co.*, 160 F.2d 766 (5th Cir. 1947); *Miller v. Douglass*, 192 Wis. 486, 213 N.W. 320 (1927); Restatement (Second), Conflict of Laws § 254a (Tent. Draft No. 5, 1959) [hereinafter cited as Restatement].

<sup>2</sup> *In re Bliss' Trust*, 26 Misc. 2d 969, 208 N.Y.S.2d 725 (Sup. Ct. 1960); *Shannon v. Irving Trust Co.*, 275 N.Y. 95, 9 N.E.2d 792 (1937); *Hutchinson v. Ross*, 262 N.Y. 381, 187 N.E. 65 (1933); *First-Central Trust Co. v. Claffin*, 49 Ohio L. Abs. 29, 73 N.E.2d 388 (C.P. 1947).

ment or the settlor's intent is not clear, then the law of the state most closely connected with the trust is normally applied. The "contacts" looked for appear to be: the place where the trust is to be administered, the trustee's place of business, the situs of trust assets, the place where the trust instrument was executed, and the domicile of the parties.<sup>3</sup>

The recent pattern of conflicts litigation in this area is reflected by the Delaware case of *Lewis v. Hanson*.<sup>4</sup> In this case the settlor, while a resident of Pennsylvania, executed a trust agreement and delivered certain securities to a trust company in Delaware. The trustee was directed to administer the trust and pay income to the settlor and then to distribute the property as the settlor should appoint by will. In holding that the circumstances indicated the settlor intended to have the trust administered and governed according to the law of Delaware, the court stated: "In determining the situs of a trust for the purpose of deciding what law is applicable to determine its validity, the most important facts to be considered are the intention of the creator of the trust, the domicile of the trustee, and the place in which the trust is administered."<sup>5</sup> While the court should and did give primary weight to the settlor's intent, it must be added that the settlor probably does not have complete autonomy in the matter of selecting the governing law; the law chosen should have some reasonable connection with the trust transaction.<sup>6</sup>

This apparent desire on the part of the courts to fashion conflict of laws rules so as to sustain trusts if possible has brought to the area of testamentary trusts of movables nearly the same flexibility that exists concerning inter vivos trusts. Since a testamentary trust must fail if the will creating it is denied probate because of defects relating to the instrument as a whole, it might be argued that the law governing the will should also govern the trust it creates.<sup>7</sup> Nevertheless, there is a marked tendency toward testing the validity of a testamentary trust of movables separately from the validity of the will itself, and it has been held that matters affecting only the validity of trust provisions, unless invalid according to some strong public policy in the state of the testa-

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<sup>3</sup> *Stetson v. Morgan Guar. Trust Co.*, 22 Conn. Supp. 158, 164 A.2d 239 (Super. Ct. 1960); *Kitchen v. New York Trust Co.*, 292 Ky. 706, 168 S.W.2d 5 (1943); Restatement § 294.

<sup>4</sup> 36 Del. Ch. 235, 128 A.2d 819 (Sup. Ct. 1957), *aff'd*, 357 U.S. 235 (1958).

<sup>5</sup> *Lewis v. Hanson*, *supra* note 4, at 245, 128 A.2d at 826.

<sup>6</sup> *City Bank Farmers Trust Co. v. Cheek*, 202 Misc. 303, 110 N.Y.S.2d 434 (Sup. Ct. 1952); *Shannon v. Irving Trust Co.*, *supra* note 2.

<sup>7</sup> To the effect that this was the common-law rule, see *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636 (1894); *Hussey v. Sargent*, 116 Ky. 53, 75 S.W. 211 (1903); *Stumberg*, Conflict of Laws 431 (2d ed. 1951); *Cavers*, "Trusts Inter Vivos and the Conflict of Laws," 44 Harv. L. Rev. 161 (1930).

tor's domicile at death, should be resolved by the law of the state designated in the will.<sup>8</sup> If there is no expression of intent in the will, the court might apply either the law of the state of testator's domicile at death or that of the state where the trust is to be administered, whichever makes the trust valid.<sup>9</sup> The significance of these rules lies in the fact that the testator's intention is relied on to sustain the trust. Consequently, the draftsman of either an inter vivos or testamentary trust of movables should include a provision expressly selecting the governing law from among those states having some reasonable connection with the trust.<sup>10</sup> It is, of course, the estate planner's responsibility to see that the law so chosen is favorable to his client's trust scheme.

When an inter vivos or testamentary trust of immovables is involved, the settlor's intent concerning selection of law is given less weight and the courts continue to adhere to the traditional choice of law rule for immovables, referring most questions to the law of the situs.<sup>11</sup> Even though the situs rule does significantly reduce the effect to be given to the settlor's intent, there appears to be at least one device whereby he may partially control the selection of governing law. If the trust instrument contains a direction to sell the land and reinvest in movables, and according to the law of the situs the land was equitably converted into movable property, the situs might apply the choice of law rule for trusts of movables. Thus, while the situs law controls the issue of equitable conversion, the validity of the particular trust terms under the rule against perpetuities or a rule restricting accumulation of income may be tested by nonsitus law.<sup>12</sup> By taking advantage of these rules concerning equitable conversion, an estate planner might in some degree give effect to his client's intent that nonsitus law should be applied.

#### POWERS OF APPOINTMENT

The *validity* of a power of appointment is essentially an issue relating to the transaction creating the power, and therefore, validity

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<sup>8</sup> *Merchants' Loan & Trust Co. v. Northern Trust Co.*, 250 Ill. 86, 95 N.E. 59 (1911); *National Shawmut Bank v. Cumming*, 325 Mass. 457, 91 N.E.2d 337 (1950); *Lozier v. Lozier*, 99 Ohio St. 254, 124 N.E. 167 (1919) (*semble*); *Matter of Chappell*, 124 Wash. 128, 213 Pac. 684 (1923).

<sup>9</sup> *Compare Hope v. Brewer*, 136 N.Y. 126, 32 N.E. 558 (1892), *with Cross v. United States Trust Co.*, 131 N.Y. 330, 30 N.E. 125 (1892).

<sup>10</sup> For examples of how such a clause might be worded, see Bogert, *Trusts and Trustees* § 1053, at 131, § 1197 (1955); Land, *Trusts in the Conflict of Laws* 121 (1940).

<sup>11</sup> See, e.g., *Acker v. Priest*, 92 Iowa 610, 61 N.W. 235 (1894); *Toledo Soc'y for Crippled Children v. Hickok*, 152 Tex. 578, 261 S.W.2d 692 (1953).

<sup>12</sup> *Clarke v. Clarke*, 178 U.S. 186 (1900); *In re Norton's Estate*, 7 Misc. 2d 342, 155 N.Y.S.2d 838 (Surr. Ct. 1956); Land, *op. cit. supra* note 10, at 29-34.

is generally determined by the law which is applied to the transaction as a whole. For example, the law which is used to test the validity of an inter vivos or testamentary trust of movables controls both the validity of the trust and any power of appointment created in the trust instrument.<sup>13</sup> Since the validity of both the trust and the power of appointment are so closely interrelated, recent cases have given the same weight to the donor's selection of governing law as is given to the settlor's expression of intent in cases involving trusts.<sup>14</sup> If a power of appointment is not included in a trust, validity is normally resolved by the rules controlling the creation of other interests in property. This means that the law of the situs of land determines the validity of a power created by inter vivos instrument or by will.<sup>15</sup> In the case of movables, the situs would likewise control powers created by inter vivos transactions, while the domicile of the testator seems to control powers of appointment created by will.<sup>16</sup>

In regard to the *exercise* of a power of appointment, the courts usually hold that the power to appoint an interest in land, either by will or inter vivos, can be exercised only by an instrument which is valid and effective for that purpose according to the law of the situs.<sup>17</sup> Thus, the issue as to whether a power over land has been exercised by a general devise which does not mention the power, is determined by the law of the state where the land is located.<sup>18</sup>

The choice of law rule concerning the validity and effect of an exercise of a power of appointment in movables is not so well-settled. According to the traditional rule, the forum should refer to the law of the donor's domicile.<sup>19</sup> However, current decisions have stressed the

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<sup>13</sup> Boston Safe Deposit & Trust Co. v. Prindle, 290 Mass. 577, 195 N.E. 793 (1935); Leflar, Conflict of Laws § 190 (1959); Restatement §§ 234, 294, comment g, 295, comment g.

<sup>14</sup> See, e.g., Lewis v. Hanson, *supra* note 4; Amerige v. Attorney Gen., 324 Mass. 648, 88 N.E.2d 126 (1949).

<sup>15</sup> Callwood v. Virgin Islands Nat'l Bank, 221 F.2d 770 (3d Cir. 1955); Durand & Herterich, "Conflict of Laws and the Exercise of Powers of Appointment," 42 Cornell L.Q. 185 (1957).

<sup>16</sup> Cf. Restatement §§ 282, 283, 295.

<sup>17</sup> Security Trust & Safe Deposit Co. v. Ward, 10 Del. Ch. 408, 93 Atl. 385 (1915); Liggett v. Fidelity & Columbia Trust Co., 274 Ky. 387, 118 S.W.2d 720 (1938); Amerige v. Attorney Gen., *supra* note 14; Land, *op. cit. supra* note 10, at 34-36.

<sup>18</sup> Art Students' League v. Hinkley, 31 F.2d 469 (D. Md. 1929), *aff'd*, 37 F.2d 224 (4th Cir. 1930); *In re Kelly's Will*, 174 Misc. 80, 20 N.Y.S.2d 6 (Surr. Ct. 1940).

<sup>19</sup> Pitman v. Pitman, 314 Mass. 465, 50 N.E.2d 69 (1943); David v. Atlantic County S.P.C.A., 129 N.J. Eq. 501, 19 A.2d 896 (ch. 1941); Adams v. D'Hauteville, 72 R.I. 325, 51 A.2d 92 (1947). For a discussion of the variations of the traditional rule, see Durand & Herterich, *supra* note 15; Mulford, "The Conflict of Laws and Powers of Appointment," 87 U. Pa. L. Rev. 403 (1939).

relationship between powers of appointment and trusts. In the case of *In re Pratt's Trust*,<sup>20</sup> a resident of Nevada created an inter vivos trust of movables in New York, appointed a New York trustee, and retained a general testamentary power to appoint the corpus. The settlor subsequently became a Florida domiciliary and died a few days after executing a will which exercised the power partially in favor of charities. Under the law of Florida, a bequest to a charity in a will executed so shortly before the testator's death is invalid, while in New York such bequests were unaffected by statute. On the question of distribution of the trust corpus in New York, the New York court held that an express choice of law clause, which provided that the trust should be governed by New York law, applied to both the trust and the exercise of the power of appointment. As a consequence, the will constituted a valid appointment of the corpus having a situs in New York. The argument for separating the trust questions from the problem of testamentary exercise of the power was specifically urged, but both New York appellate courts treated the testamentary exercise of the power as being controlled by the law governing the trust in general. This case illustrates a trend to identify the validity of an exercise of a power of appointment with the validity of the trust in which the power was created, and to permit the law designated by the settlor-donor to be controlling if that law has some reasonable connection with the trust and power of appointment.<sup>21</sup>

### WILLS

A semanticist might say that an attorney "planned" an estate if he intentionally advised intestacy, but the lack of a testamentary

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<sup>20</sup> 5 App. Div. 2d 501, 172 N.Y.S.2d 965 (1958), *aff'd*, 8 N.Y.2d 855, 203 N.Y.S.2d 906 (1960).

<sup>21</sup> *Accord*, *Lewis v. Hanson*, *supra* note 4; *Wilmington Trust Co. v. Wilmington Trust Co.*, 26 Del. Ch. 397, 24 A.2d 309 (1942); *In re Bauer's Trust*, 13 App. Div. 2d 369, 216 N.Y.S.2d 920 (1961); *First-Central Trust Co. v. Claffin*, *supra* note 2. If the settlor-donor expresses no intent concerning the law to be applied, the court might look for the law most closely connected with the trust creating the power of appointment. For example, in *Morgan Guar. Trust Co. v. Huntington*, 149 Conn. 331, 179 A.2d 604 (1962), the testator died a domiciliary of Connecticut, having executed a will which did not exercise his power of appointment according to the law of Connecticut. The trust which gave the testator the power to appoint the movable corpus was created in New York, a New York trustee was appointed, and the situs of the trust corpus was in New York. According to New York law, the testator's will did exercise his power, although the exercise was partially invalid under the New York rule against perpetuities. The Connecticut court concluded that a prior New York holding that the testator exercised the power was binding in Connecticut. The court stressed the facts that the trust corpus was located and administered in New York and all interested parties appeared in the prior New York litigation. See also Restatement § 299b.

instrument almost always indicates the absence of any estate plan. For this reason, conflict of laws problems relating to intestacy are beyond the scope of this study and should be disposed of in a summary fashion. According to the prevailing views, devolution of immovables is governed by the internal and conflict of laws rules of the situs,<sup>22</sup> and movables are distributed according to the law of the decedent's domicile at the time of death.<sup>23</sup> While there have been few deviations from these general rules,<sup>24</sup> it has been argued that intestate distribution of tangible personal property is in fact controlled by the law of the situs, and the situs refers to the law of the decedent's domicile as a matter of "convenience."<sup>25</sup> The ultimate power of the situs to control distribution of intestate tangible personalty is best illustrated by the cases holding that such property escheats to the state where it is located and not to the state of the decedent's domicile.<sup>26</sup>

The common-law conflict of laws rules for testate succession are analogous to those dealing with intestate succession: (i) The validity and effect of a testamentary gift of an immovable is tested by the internal and conflict of laws rules of the situs,<sup>27</sup> and (ii) the validity and effect of a bequest of movable property is governed by the law of the testator's domicile at the time of death.<sup>28</sup> Since these rules have been hallowed by continuous repetition, the following materials are designed to delineate the extent to which they are actually applied.

### *Execution of Wills*

Although testamentary capacity might be characterized as an issue of status and resolved according to the law of the testator's domicile at

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<sup>22</sup> *In re Estate of Gray*, 168 F. Supp. 124 (D.D.C. 1958); *Estate of Drumheller v. Terry*, 252 Iowa 1378, 110 N.W.2d 833 (1961); *White v. Tennant*, 31 W. Va. 790, 8 S.E. 596 (1888); *Dacey*, *Conflict of Laws* 59 (6th ed. 1949); *Stimson*, "Conflict of Laws and the Administration of Decedents' Real Estate," 6 Vand. L. Rev. 545 (1953).

<sup>23</sup> *Ginther v. The American Ranger*, 189 F. Supp. 872 (D. Md. 1960); *Estate of Toler v. Workman*, 325 S.W.2d 755 (Mo. 1959); *Planson v. Scott*, 26 Ohio App. 122, 158 N.E. 588 (1927); *Leflar*, *op. cit. supra* note 13, § 184.

<sup>24</sup> The most notable exception is found in a Mississippi statute which provides: "All personal property situated in this state shall . . . be distributed according to the laws of this state . . . notwithstanding the domicile of the decedent may have been in another state. . . ." Miss. Code Ann. § 467 (1956).

<sup>25</sup> See *Goodrich*, *Conflict of Laws* § 165 (3d ed. 1949); *Stumberg*, *op. cit. supra* note 7, at 412-13; *Restatement* § 303.

<sup>26</sup> *In re Forney's Estate*, 43 Nev. 227, 184 Pac. 206 (1919) (*semble*); *In re Barnett's Trusts* [1902] 1 Ch. 847; *Griswold*, "Renvoi Revisited," 51 Harv. L. Rev. 1165, 1194 (1938). *But see California v. Tax Comm'n*, 55 Wash. 2d 155, 346 P.2d 1006 (1959) (intangible property held to escheat to the state of the decedent's domicile).

<sup>27</sup> See *Stimson*, *supra* note 22; *Restatement* § 249.

<sup>28</sup> See *Goodrich*, *op. cit. supra* note 25, § 168; *Restatement* § 306.

the time his will was executed, the usual conflict of laws situs and domiciliary rules have been applied with apparent uniformity.<sup>29</sup> These rules have also been applied to test compliance with statutory formalities. For instance, a decree admitting a will to probate at the testator's domicile need not be given full faith and credit in the state where land is located,<sup>30</sup> and the situs may refuse to give effect to an attempted disposition of local land if the instrument does not comply with local requirements.<sup>31</sup> When movable property is involved, the law of the decedent's domicile at death has been applied although he was not domiciled in that jurisdiction when the will was executed.<sup>32</sup> These conclusions might be justified by arguing that the situs of land is the logical forum to resolve issues of title and insure proper recordation, and the decedent's domicile at death provides a convenient unitary reference for solving problems of succession to movables. But are these conclusions reasonable? The policy underlying internal laws of succession is to give effect to the testator's intent, subject only to such limitations as the law might impose. If the testator's intent is clear and he fully complied with the law of his domicile at the time of execution, why should his intent be frustrated by inflexible conflict of laws rules?<sup>33</sup>

Remedial legislation has properly removed the inflexibility inherent in the common-law domiciliary and situs rules. At least thirty states have enacted statutes which permit local probate of a will if executed in compliance with the law of the place of execution or according to the law of the testator's domicile at the time of execution or at

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<sup>29</sup> See, e.g., *Selle v. Rapp*, 143 Ark. 192, 220 S.W. 662 (1920); *Shaw v. Grimes*, 187 Ky. 250, 218 S.W. 447 (1920); *Cameron v. Watson*, 40 Miss. 191 (1866); *Carpenter v. Bell*, 96 Tenn. 294, 34 S.W. 209 (1896).

<sup>30</sup> *Clarke v. Clarke*, *supra* note 12; *Robertson v. Pickrell*, 109 U.S. 608 (1883); *Trotter v. Van Pelt*, 144 Fla. 517, 198 So. 215 (1940).

<sup>31</sup> *McPherson v. McKay*, 207 Ark. 546, 181 S.W.2d 685 (1944); *White v. Greenway*, 303 Mo. 691, 263 S.W. 104 (1924); *Manuel v. Manuel*, 13 Ohio St. 458 (1862); *Toledo Soc'y for Crippled Children v. Hickok*, *supra* note 11.

<sup>32</sup> *Moultrie v. Hunt*, 23 N.Y. 394 (1861); *In re Beaumont's Estate*, 216 Pa. 350, 65 Atl. 799 (1907).

<sup>33</sup> Professor Yiannopoulos contends that the domiciliary rule is "not one of those rules 'deeply embedded' in the common law," and "in a multiple contact case it is actually the law validating the disposition which governs the formal validity of wills of movables." Yiannopoulos, "Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary 'Rule,'" 46 Calif. L. Rev. 185, 193, 203 (1958). Conceding that there may be more flexibility in the common-law domiciliary rule than most authorities are willing to admit, an early Ohio case did apply the common-law rule and denied probate although the will was valid according to the law of the place of execution. *Manuel v. Manuel*, *supra* note 31.

death.<sup>34</sup> Following this trend, in 1953 Ohio added a generally similar provision to section 2107.18 of the Revised Code which states:

The probate court shall admit a will to probate if it appears that such will was attested and executed according to the law in force at the time of execution in the state where executed, or according to the law in force in this state at the time of death, or according to the law in force in the state where the testator was domiciled at the time of his death, and if it appears that the testator at the time of executing such will was of full age, of sound mind and memory, and not under restraint.

This statute should remedy the problems which Ohio has experienced incident to attempting to accomplish validation through the ancillary administration provisions.<sup>35</sup> These latter sections primarily were designed to provide for local ancillary administration after probate elsewhere and were held not applicable in the case of a resident leaving a foreign-executed will.<sup>36</sup> They likewise did not change the common-law conflict rules requiring devises of local land to satisfy Ohio law.<sup>37</sup> Since 1953, validation should result whether in ancillary administration under section 2129.05 or in original probate under section 2107.18 if the written will was in fact duly executed by the law of the place of execution or of the domicile of the testator at death.

### *Interpretation and Construction of Wills*

*Interpretation* of a will may be defined as "the process of discovering the meaning or intention of the testator," and *construction* as the process of assigning legal significance or effect to testamentary language after its meaning is resolved.<sup>38</sup> Since interpretation is properly a question of "fact" which may be resolved without selecting any particular "law," it has been argued that interpretation gives rise to no true conflict of laws problems.<sup>39</sup> However, once the testator's intent is discovered, or his absence of intent is shown, the court must apply rules of "construction" to assign legal significance to his expressed or probable intent. The extent to which the law permits fulfillment of testamentary intent is clearly a question of substantive law which may give rise to choice of law problems.

In cases involving immovable property, the construction of a testa-

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<sup>34</sup> See Scoles, "Conflict of Laws in Estate Planning," 9 U. Fla. L. Rev. 398, 416-17 (1956).

<sup>35</sup> Ohio Rev. Code §§ 2129.05-.06 (1953).

<sup>36</sup> *Manuel v. Manuel*, *supra* note 31.

<sup>37</sup> *Meese v. Keefe*, 10 Ohio 362 (1841); *Bailey v. Bailey*, 8 Ohio 239 (1837).

<sup>38</sup> *Atkinson*, *Wills* § 146 (2d ed. 1953).

<sup>39</sup> *Yiannopoulos*, *supra* note 33, at 243.



mentary expression of intent and the legal effect of failure to clearly express intent are normally resolved according to the law of the situs.<sup>40</sup> If a West Virginia domiciliary provides for his spouse in a will executed and later probated in that state, an Ohio court will apply Ohio presumptions to determine whether the testator intended that she should have dower in Ohio land in addition to taking under the will.<sup>41</sup> Likewise, a gift to the testator's children "when they reach majority" will be given legal effect according to the law of the situs.<sup>42</sup> But based in large part on the Kansas case of *Keith v. Eaton*,<sup>43</sup> several jurisdictions have resolved problems of construction according to the law of the testator's domicile.<sup>44</sup> These cases reason that the testator's intent was unitary and not dependent upon the law of each jurisdiction where land might be located, and since the testator was most familiar with the law of his domicile he presumably intended a construction in accord with that law. Although this approach is superficially reasonable, if the issue is the legal effect of words in creating or defining interests in land, the forum should properly refer to the law of the jurisdiction where the land is located.<sup>45</sup>

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<sup>40</sup> See, e.g., *Bowen v. Frank*, 179 Ark. 1004, 18 S.W.2d 1037 (1929); *Peet v. Peet*, 229 Ill. 341, 82 N.E. 376 (1907); *Scofield v. Hadden*, 206 Iowa 597, 220 N.W. 1 (1928); *Thompson v. Penn*, 149 Ky. 158, 148 S.W. 33 (1912); *Brewster v. Benedict*, 14 Ohio 368 (1846) (*semble*). Although the courts often speak of interpretation and construction as though they mean the same thing, Professor Beale recognizes the distinction and maintains that the former is governed by the law of the testator's domicile and the latter by the law of the situs. 2 Beale, *Conflict of Laws* §§ 251.1-3 (1935). The cases of *In re Germon's Estate*, 35 Misc. 2d 12, 226 N.Y.S.2d 940 (Surr. Ct. 1962), and *In re Gallagher's Estate*, 10 Misc. 2d 422, 169 N.Y.S.2d 271 (Surr. Ct. 1957), appear to support this thesis. However, any "conflict" arising in the process of interpretation is not properly a conflict of laws. When interpreting the factual meaning of testamentary language, the forum should consider surrounding circumstances, including the meaning attached to words according to the usage prevailing in the testator's domicile at the time the will was drafted. But this does not involve choice of law; it is simply a matter of resolving factual meaning according to relevant circumstances.

<sup>41</sup> *Jennings v. Jennings*, 21 Ohio St. 56 (1871).

<sup>42</sup> *Craighead v. Pike*, 5 Ohio Dec. Reprint 273 (Cincinnati Super. Ct. 1875), discussed in Stumberg, *op. cit. supra* note 7, at 421.

<sup>43</sup> 58 Kan. 732, 51 Pac. 271 (1897).

<sup>44</sup> See *Higinbotham v. Manchester*, 113 Conn. 62, 154 Atl. 242 (1931); *Houghton v. Hughes*, 108 Me. 233, 79 Atl. 909 (1911); *Martin v. Eslick*, 229 Miss. 234, 90 So. 2d 635 (1956); *Zombro v. Moffett*, 329 Mo. 137, 44 S.W.2d 149 (1931).

<sup>45</sup> Stumberg, *op. cit. supra* note 7, at 421; Stimson, *supra* note 22. The Restatement (Second) attempts to harmonize the situs and domicile rules in the following manner: Authority is nearly equally divided as to whether in situations where there is no satisfactory evidence of the testator's intentions, the meaning of the words in question should be determined according to usage in the state where the testator was domiciled at the time the will was executed, or according to usage prevailing at the situs of the land. If in a given case, the courts of the situs would look to their own local usage to determine the

Choice of law problems relating to the construction of wills disposing of movables are not as easily resolved as those relating to testamentary dispositions of land. Assume that the testator was domiciled in Virginia when he executed a will in Indiana, and he died domiciled in Illinois. An Ohio court called upon to construe the legal effect of words disposing of movables having a situs in Ohio might reasonably refer to the law of any of the four states mentioned. Fortunately, the courts are willing to give effect to an express or implied testamentary direction concerning choice of law,<sup>46</sup> and it is wise to include such a clause whenever an estate has multistate contacts. In the absence of such a provision, the prevailing rule calls for application of the law of the testator's domicile,<sup>47</sup> but the cases are not clear as to whether reference should be made to the law of the testator's domicile at the time the will was executed or at the time of his death. The few cases in point seem to express a preference for the former,<sup>48</sup> arguing that the testator probably would have intended a construction according to the law of his domicile at the time the will was drafted, particularly in cases where his subsequent change of domicile was not anticipated.

#### *Protection of the Surviving Spouse*<sup>49</sup>

Freedom of testamentary disposition is limited in all states by statutes or case law designed to protect the testator's surviving spouse.<sup>50</sup> Such protection may take the form of common-law dower, forced heirship, homestead, allowance for support pending probate, or other simi-

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meaning of the words used in the devise, the forum will do likewise. If, on the other hand, the situs courts would look to usage in the state of the testator's domicile, the forum will again do the same. It is particularly likely that the situs courts would adopt the latter alternative in situations where land in two or more states is covered by a single devise. This is because the testator presumably intended the words to bear a single meaning and not mean perhaps as many different things as there are states in which there is land covered by the devise. See Restatement § 214, comment *d*, § 251, comment *b*.

<sup>46</sup> See *Harrison v. Nixon*, 34 U.S. (9 Pet.) 315 (1835); *Lozier v. Lozier*, *supra* note 8; *Smith v. Mercantile Trust Co.*, 199 Md. 264, 86 A.2d 504 (1952) (*dicta*); *Second Bank-State Street Trust Co. v. Weston*, 342 Mass. 630, 174 N.E.2d 763 (Mass. 1961).

<sup>47</sup> *Second Bank-State Street Trust Co. v. Weston*, *supra* note 46; *In re Sewart's Estate*, 342 Mich. 491, 70 N.W.2d 732 (1955); *Lozier v. Lozier*, *supra* note 8; *Skinner v. Brunsen*, 59 R.I. 159, 32 A.2d 263 (1943).

<sup>48</sup> *Staigg v. Atkinson*, 144 Mass. 564, 12 N.E. 354 (1887); *Houghton v. Hughes*, *supra* note 44; *Estate of Pleasonton*, 45 N.J. Super. 154, 131 A.2d 795 (1957). *Cf.* Restatement § 308.

<sup>49</sup> Protection of the surviving spouse was selected for discussion from among a number of possible statutory limitations on freedom of testamentary disposition.

<sup>50</sup> Leach, *Cases on Wills* 16-19 (2d ed. 1960); 3 Vernier, *American Family Laws* §§ 189, 205, 216, 228 (1935); Breslauer, "Conflict of Laws in Restrictions on Freedom of Testation," 27 Iowa L. Rev. 425 (1942); Scoles and Rheinstein, "Conflict Avoidance in Succession Planning," 21 Law and Contemp. Prob. 499, 506 (1956).

lar provisions. Since protection of some sort is provided for in all states, but applicable statutes vary greatly in scope and detail, conflict of laws rules normally determine the *degree* of protection available to a surviving spouse in cases where the testator left property having a situs in more than one state. The Restatement of Conflicts offers a deceptively simple solution: The interests of a surviving spouse in land owned by the testator are determined by the law of the state where the land is located,<sup>51</sup> and claims against personal property are governed by the law of the testator's domicile.<sup>52</sup> These rules are mechanically easy to apply and do frequently afford the surviving spouse with adequate protection, but mechanical application should be avoided because they do not necessarily further the interests of the state having predominant contact with support and maintenance for the surviving spouse.

When the surviving spouse claims an interest in land, either in addition to or in lieu of testamentary gifts, the cases support the position taken by the Restatement and refer such questions to the law of the situs.<sup>53</sup> Justification for this rule may be based on the fact that creditors or heirs claiming a right against the land normally seek satisfaction in the state where the land is located, and therefore, that state has predominant contact with the degree of protection which should be afforded against such claims. On the other hand, it is frequently difficult to justify the rule requiring application of the law of the testator's domicile in cases where the surviving spouse claims an interest in movable property. The testator's "legal" domicile at death is not necessarily the state where the surviving spouse resides, nor is it necessarily the state where movable property is located. In the case of *In re McComb's Estate*,<sup>54</sup> the testator and his widow were legally "domiciled" in Texas at the time of his death, but both parties had in fact "resided" in Ohio for a number of years and the bulk of the testator's movable property had a situs in Ohio. Ohio was therefore the state having predominant contact with securing adequate support and maintenance for the widow,

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<sup>51</sup> Restatement §§ 248(1), 253. California by statute applies the law of the domicile of a nonresident to elective shares in both movables and immovables. The problems peculiar to estates having some contact with California are ably discussed in Able, Barry, Halsted and Marsh, "Rights of a Surviving Spouse in Property Acquired by Decedent While Domiciled Outside of California," 47 Calif. L. Rev. 211 (1959).

<sup>52</sup> Restatement § 301.

<sup>53</sup> *In re Graham's Estate*, 73 Ariz. 179, 239 P.2d 365 (1951) (homestead); *Mayo v. Arkansas Valley Trust Co.*, 132 Ark. 64, 200 S.W. 505 (1917) (necessity of filing a petition for assignment of dower in order to claim rents from Ohio land, governed by Ohio law); *Hussa v. Hussa*, 65 So. 2d 759 (Fla. 1953) (homestead); *Sinclair v. Sinclair*, 99 N.H. 316, 109 A.2d 851 (1954) (widow's statutory share); *Jennings v. Jennings*, *supra* note 41 (right of surviving spouse to take against the testator's will and claim dower).

<sup>54</sup> 52 Ohio L. Abs. 353, 80 N.E.2d 573 (P. Ct. 1948).

and based on a construction of Ohio legislation, the court applied Ohio law and granted her a year's allowance for support out of Ohio personal property.<sup>55</sup> Even in the absence of any statute susceptible to such a conclusion, it has been argued that the courts in fact apply the law of the state which will grant protection to the surviving spouse.<sup>56</sup> Such flexibility is desirable if we assume that the courts should effectuate a policy of protecting the surviving spouse notwithstanding the testator's intent to the contrary.

## TAXATION

### *Double Taxation*

Justice Holmes was of the opinion that there is no federal constitutional prohibition against taxation of the same property by more than one state.<sup>57</sup> Our problem is: To what extent has his opinion become law?

The courts have held that death taxes may be imposed on land

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<sup>55</sup> In 1953, Ohio Rev. Code § 2117.23 was amended so as to broaden the statute and facilitate the granting of a year's allowance in cases where the decedent was a nonresident. Compare *In re McCombs' Estate*, *supra* note 54, with *Estate of Weatherhead*, 73 Ohio L. Abs. 524, 137 N.E.2d 315 (P. Ct. 1956). Assuming that an allowance is granted under this statute, what effect will such an award be given in the state of the decedent's domicile? In *Mann v. Peoples-Liberty Bank & Trust Co.*, 256 S.W.2d 489 (Ky. 1953), an Ohio court granted a year's allowance to a widow residing in Kentucky and charged the allowance against the decedent's Ohio land. The Kentucky court held that the Ohio allowance should not be deducted from the share which the widow ultimately received. However, in *Keyser's Estate*, 87 Pittsb. Leg. J. (n.s.) 289, 36 Pa. D. & C. 515 (Allegheny County Orphans' Ct. 1939), the widow of a Pennsylvania domiciliary had received a year's allowance from assets in Ohio, and the Pennsylvania court held that she could make no additional claim for allowance in Pennsylvania unless the Ohio allowance was less than that available under Pennsylvania law. The problem involved in such cases is primarily one of statutory construction, and the statutes and cases in the state of the decedent's domicile should be investigated before advising a nonresident widow to claim an allowance out of Ohio assets. To the effect that a nonresident surviving spouse may claim Ohio property exempt from probate, see *In re Estate of Mitchell*, 97 Ohio App. 443, 127 N.E.2d 39 (1954); *Estate of Weatherhead*, *supra*.

<sup>56</sup> Yiannopoulos, *supra* note 33, at 220, 225. A striking example of Professor Yiannopoulos' thesis is provided by the case of *Estate of Gould*, 75 Ohio L. Abs. 289, 140 N.E.2d 793 (P. Ct. 1956). In this case, the testatrix and her husband were domiciled in Bermuda, but testatrix owned substantial personal property having a situs in Ohio. According to the law of Bermuda, a surviving spouse had no right to renounce a will and receive an intestate share. The Ohio court applied Ohio law and permitted the surviving husband to renounce the will and receive his intestate share of Ohio personal property. The court partially justified its conclusion by arguing that the will had not been offered for probate in Bermuda, thus permitting the administrator to proceed with probate in Ohio as though testatrix had resided in Ohio at the time of her death.

<sup>57</sup> See *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 211 (1905) (dissenting opinion); *Blackstone v. Miller*, 188 U.S. 189 (1903).

only at the situs, thereby precluding the possibility of double taxation.<sup>58</sup> A similar rule exists as to tangible personal property if it has a "permanent" location. In *Frick v. Pennsylvania*,<sup>59</sup> Pennsylvania imposed a death transfer tax on a domiciliary's tangible personal property, a portion of which was permanently located in New York and Massachusetts. The Supreme Court held that the jurisdiction of the situs to tax such property is "not partial but plenary," and concluded that the Pennsylvania tax violated the fourteenth amendment in so far as it was imposed on personal property permanently located in other states.<sup>60</sup> Permanency of location thus appears to be the basic contact between tangible personal property and a constitutional tax situs.

Attempts to locate the tax situs of intangible property have resulted in the construction of judicial labyrinths to justify the conclusion that double taxation is constitutional in certain cases. For example, New Jersey and Pennsylvania may agree that a decedent can be domiciled in only one state and death taxes may be assessed on his intangibles only by the state of his domicile.<sup>61</sup> However, the location of the decedent's domicile is a factual issue, and New Jersey may conclude that the decedent was domiciled there notwithstanding Pennsylvania's previous holding that his only domicile was in Pennsylvania.<sup>62</sup> Because the decedent's "only" domicile was in two states, the practical result is taxation of the same intangibles by both states. The Supreme Court has sustained the constitutionality of such double taxation by arguing that there is no constitutional provision which requires uniform conclusions concerning the location of a decedent's domicile.<sup>63</sup>

Justice Holmes' opinion has also been accepted in cases where intangible property has overlapping tax bases. If the subject of taxation is the intangible corpus of an inter vivos trust, the trustee's domi-

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<sup>58</sup> Cf. *Blodgett v. Silberman*, 277 U.S. 1 (1928); *Maxwell v. Bugbee*, 250 U.S. 525 (1919); *Union Refrigerator Transit Co. v. Kentucky*, *supra* note 57, at 204 (dicta).

<sup>59</sup> 268 U.S. 473 (1925).

<sup>60</sup> *Accord*, *Treichler v. Wisconsin*, 338 U.S. 251 (1949); *City Bank Farmers Trust Co. v. Schnader*, 293 U.S. 112 (1934); *Leflar*, *Conflict of Laws* § 214 (1959).

<sup>61</sup> The hypothetical discussed in the text is based on the now-classic *Dorrance* litigation. *Dorrance v. Thayer-Martin*, 115 N.J. Eq. 268, 170 Atl. 601 (Prerog. Ct. 1934), *aff'd*, 13 N.J. Misc. 168, 176 Atl. 902 (Sup. Ct. 1935), *aff'd*, 116 N.J.L. 362, 184 Atl. 743 (E. & A. 1936), *cert. denied*, 298 U.S. 678 (1936); *Hill v. Martin*, 296 U.S. 393 (1935); *Dorrance's Estate*, 309 Pa. 151, 163 Atl. 303 (1932).

<sup>62</sup> *Ibid.* See also *Guterman*, "Avoidance of Double Death Taxation of Estates and Trusts," 95 U. Pa. L. Rev. 701 (1947); *Tweed & Sargent*, "Death and Taxes Are Certain—But What of Domicile," 53 Harv. L. Rev. 68 (1939).

<sup>63</sup> *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937). See *Clark*, "A State's Tax Jurisdiction as Limited by the United States Constitution," 13 U. Fla. L. Rev. 401, 432-34 (1960).

cile may tax his property interest<sup>64</sup> and the beneficial interest may be taxed in the state of the beneficiary's domicile.<sup>65</sup> In regard to death taxes, the Supreme Court has permitted the decedent-settlor's domicile to tax the intangible corpus of a foreign trust, at the same time recognizing the validity of a tax assessed in the state where the trustee was domiciled and the trust administered.<sup>66</sup> The Supreme Court has also sustained a death tax imposed by Utah on shares in a Utah corporation, although the same shares were previously taxed in New York where the decedent was domiciled.<sup>67</sup>

The labyrinth of double taxation is further confused by asking the question: What is "intangible" personal property? *Blodgett v. Silverman*<sup>68</sup> provides the best thumbnail sketch of the Supreme Court's approach to the problem of characterization. The Court held: (i) Based on New York internal law, the decedent's interest in a New York partnership was "intangible," and therefore, New York land owned by the partnership was subject to taxation in Connecticut where the decedent was domiciled; (ii) Connecticut's characterization of United States bonds as "tangible" was incorrect; bonds are "intangible" and may be taxed by the decedent's domicile; and (iii) The decedent's savings account in a New York bank was an "intangible" asset and subject to death taxes in Connecticut, although cash in a New York safe deposit box was "tangible" and taxable only at the situs.<sup>69</sup>

By combining the holdings in each of the cases discussed above, it appears that an estate planner should ask the following questions: Is the property involved "tangible" or "intangible"? If characterized as tangible, where is its "permanent" location? If characterized as intangible, does the property or its owner have contacts with more than one state, thus opening the door for double situs and double domicile? If the answers to these questions lead to a conclusion of double taxation, some relief might be available in those states which have enacted reciprocal and nonresident exemption statutes.<sup>70</sup> Since these statutes do

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<sup>64</sup> *Greenough v. Tax Assessors*, 331 U.S. 486 (1947).

<sup>65</sup> *Commonwealth v. Stewart*, 338 Pa. 9, 12 A.2d 444 (1940), *aff'd sub nom.*, *Stewart v. Pennsylvania*, 312 U.S. 649 (1941).

<sup>66</sup> *Curry v. McCanless*, 307 U.S. 357 (1939); *Graves v. Elliott*, 307 U.S. 383 (1939); *Bullen v. Wisconsin*, 240 U.S. 625 (1916). See also *Graves v. Schmidlapp*, 315 U.S. 657 (1942).

<sup>67</sup> *Commissioner v. Aldrich*, 316 U.S. 174 (1942).

<sup>68</sup> *Supra* note 58.

<sup>69</sup> *Accord*, *Thomas v. Virginia*, 364 U.S. 443 (1960). The facts in this case are reported in *Fiduciary Decisions*, 100 *Trusts & Estates* 158 (1961).

<sup>70</sup> See, e.g., *Fla. Stat. § 198.44* (1958); *Ill. Rev. Stat. ch. 120, § 375* (1959); *Ohio Rev. Code § 5731.10* (1953).

not insure complete freedom from double taxation,<sup>71</sup> an estate planner should advise his client to locate assets so as to force taxing states into the courts of a single state for the satisfaction of their claims. If litigation can be forced into a common tribunal, each state submitting a tax claim will be bound by the findings of that court.<sup>72</sup>

### *Apportionment of Federal Estate Taxes*

Congress has specifically provided for apportionment of federal estate taxes on life insurance proceeds and appointive property,<sup>73</sup> but there is no federal statute indicating which beneficiaries must bear the burden of federal taxes on other property. Due to the fact that Congress has not occupied the entire field, allocation of federal inheritance taxes is governed by state law.<sup>74</sup> According to the common-law rule, it is presumed that inheritance taxes are a charge on residuary assets.<sup>75</sup> If this presumption is not rebutted, the result may be substantial frustration of the testator's probable intent, particularly in cases where the residue is left to his spouse or children. To alleviate this potential inequity, about half of the states have abandoned the common-law rule, either by statute<sup>76</sup> or case law,<sup>77</sup> and estate taxes are prorated among beneficiaries unless the testator indicates a contrary intent. The source of potential conflict of laws litigation is obvious: Which law governs if the decedent was domiciled in State X where apportionment is required and he owned property having a situs in State Y where the common-law presumption is applied?

It might be argued that the forum should apply the law of the state which controls succession, *e.g.*, the law of the situs of land should determine whether the devisee must contribute toward payment of federal estate taxes. However, the courts have shown little desire to har-

<sup>71</sup> Marsh, "Multiple Death Taxation in the United States," 8 U.C.L.A.L. Rev. 69 (1961).

<sup>72</sup> *In re Benjamin's Estate*, 289 N.Y. 554, 43 N.E.2d 531 (1942); *Matter of Trowbridge*, 266 N.Y. 283, 194 N.E. 756 (1935).

<sup>73</sup> Int. Rev. Code of 1954, §§ 2206, 2207.

<sup>74</sup> *Riggs v. Del Drago*, 317 U.S. 95 (1952); *Morgan Guar. Trust Co. v. Huntington*, 149 Conn. 331, 179 A.2d 604 (1962).

<sup>75</sup> *First Nat'l Bank v. Hart*, 383 Ill. 489, 50 N.E.2d 461 (1943); *Gelin v. Gelin*, 229 Minn. 516, 40 N.W.2d 342 (1949). See Sutter, "Apportionment of the Federal Estate Tax in the Absence of Statute or an Expression of Intention," 51 Mich. L. Rev. 53 (1952).

<sup>76</sup> See, *e.g.*, Cal. Prob. Code §§ 970-77; N.Y. Deced. Est. Law § 124; Pa. Stat. Ann. tit. 20, §§ 881-87 (Supp. 1961). See Scoles & Stephens, "The Proposed Uniform Estate Tax Apportionment Act," 43 Minn. L. Rev. 907 (1959).

<sup>77</sup> *Pearcy v. Citizens Bank & Trust Co.*, 121 Ind. App. 136, 96 N.E.2d 918 (1951); *In re Gallagher's Will*, 57 N.M. 112, 255 P.2d 317 (1953); *McDougall v. Central Nat'l Bank*, 157 Ohio St. 45, 104 N.E.2d 441 (1952), *explained in* *Campbell v. Lloyd*, 162 Ohio St. 203, 122 N.E.2d 695 (1954), *cert. denied*, 349 U.S. 911 (1955).

monize the rules relating to succession and apportionment of death taxes. A series of New York cases have held that the issue of apportionment should be controlled by the law of the decedent's domicile at the time of death.<sup>78</sup> This rule has been applied whether the testamentary donee receives movable or immovable property, and whether immovable property is located in the forum or elsewhere.<sup>79</sup>

The New York domicile rule has met with greatest resistance in cases involving nonprobate assets which are nevertheless includible in the decedent's gross estate for federal inheritance tax purposes. In *Isaacson v. Boston Safe Deposit & Trust Co.*,<sup>80</sup> the decedent created an inter vivos trust in Massachusetts while domiciled in that state. He later moved and was domiciled in Maine at the time of his death. The Massachusetts court concluded that a local trust was involved, and the issue of apportionment of federal estate taxes was resolved by applying Massachusetts law rather than the law of the decedent-settlor's domicile at the time of his death.<sup>81</sup> The fact that the inter vivos trust fund was included in the decedent's gross estate for federal tax purposes was held to be an insufficient contact with Maine to warrant application of its law. The Massachusetts rule appeals to logic by correlating the choice of law rule for apportionment with the traditional conflicts rules concerning inter vivos trusts. However, it has been suggested that the New York domicile rule is preferable regardless of its inconsistency with other conflict of laws rules.<sup>82</sup> If an estate planner can accurately predict who will ultimately share in the payment of federal inheritance taxes, he can arrange a testamentary scheme which is consistent with his client's wishes. To facilitate accurate prediction and uniformity, the courts should select the law of a single state to control the allocation of payment of federal inheritance taxes. The domicile reference "brings about the desirable result of uniform treatment . . . , for regardless of the situs of the property there is a single point of reference—decedent's domicile."<sup>83</sup>

Federal legislation is the obvious solution to the problems involved, and the present tendency toward multistate location of assets should

<sup>78</sup> See, e.g., *In re Huntington's Trust*, 14 App. Div. 2d 312, 220 N.Y.S.2d 664 (1961); *In re Royse's Estate*, 118 N.Y.S.2d 421 (Surr. Ct. 1952); *In re Peabody's Estate*, 115 N.Y.S.2d 337 (Sup. Ct. 1952). *Accord*, *Morgan Guar. Trust Co. v. Huntington*, *supra* note 74 (*semble*); *Trust Co. v. Nichols*, 62 N.J. Super. 495, 163 A.2d 205 (1960).

<sup>79</sup> See, e.g., *In re Royse's Estate*, *supra* note 78.

<sup>80</sup> 325 Mass. 469, 91 N.E.2d 334 (1950).

<sup>81</sup> *Accord*, *Knowles v. National Bank*, 345 Mich. 671, 76 N.W.2d 813 (1956) (*semble*); *First Nat'l Bank v. First Trust Co.*, 242 Minn. 226, 64 N.W.2d 524 (1954).

<sup>82</sup> Scoles, "Apportionment of Federal Estate Taxes and Conflict of Laws," 55 Colum. L. Rev. 261, 280 (1955).

<sup>83</sup> *Doetsch v. Doetsch*, 312 F.2d 323, 328 (7th Cir. 1963).



eventually evoke congressional action. To counteract the present lack of federal legislation, a "Uniform Estate Tax Apportionment Act" has been proposed.<sup>84</sup> Although uniform state legislation is clearly desirable, the proposed act has been criticized for its failure to adequately resolve conflict of laws problems.<sup>85</sup> Fortunately, estate planners need not wait for adequate federal or state legislation. If a will clearly indicates how estate taxes are to be paid, as to both probate and nonprobate assets which might be includible in the testator's gross estate, his expression of intent will be given full effect and his testamentary scheme will not be distorted because of uncertain conflict of laws rules.<sup>86</sup>

#### MISCELLANEOUS PROBLEMS

##### *Gifts*

Few conflict of laws rules are as well-settled as those relating to choice of law to determine the validity of an inter vivos conveyance of land: the law of the situs is controlling.<sup>87</sup> This usually means that the law of the jurisdiction where land is located resolves the validity of an attempted inter vivos gift. However, Ohio is one of several states having a statute which validates conveyances of local land if the deed conforms to the law of the place of execution.<sup>88</sup> For example, if the donor attempts to make a gift of Ohio land by executing a deed in Illinois, the gift will be effective in Ohio if the conveyance satisfies the laws of either Ohio or Illinois.<sup>89</sup>

Inter vivos gifts of movables give rise to more intricate conflict of laws problems. According to the early common law, movables had no "locality" because they followed their owner, and therefore, the law of the donor's domicile determined the validity of an inter vivos gift.<sup>90</sup>

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<sup>84</sup> Handbook of the National Conference of Commissioners on Uniform State Laws 131-32, 219-26 (1958).

<sup>85</sup> Scoles & Stephens, *supra* note 76.

<sup>86</sup> See, e.g., *Merchants Nat'l Bank v. Merchants Nat'l Bank*, 318 Mass. 563, 62 N.E.2d 831 (1945) (testator's intent may be implied); *Fidelity Union Trust Co. v. Suydam*, 125 N.J. Eq. 458, 6 A.2d 392 (Ch. 1939) (effect given to testamentary expression of intent); *In re Jeffery's Estate*, 333 Pa. 15, 3 A.2d 393 (1939) (effect given to expression of intent in inter vivos trust instrument).

<sup>87</sup> *McGoon v. Scales*, 76 U.S. (9 Wall.) 23 (1869); *United States v. Crosby*, 11 U.S. (7 Cranch) 114 (1812); *Thompson v. Kyle*, 39 Fla. 582, 23 So. 12 (1897); *Cook*, "Immovables" and the "Law" of the "Situs," 52 Harv. L. Rev. 1246 (1939).

<sup>88</sup> Ohio Rev. Code § 5301.06 (1953). See also Conn. Gen. Stat. Rev. § 47-7 (1958); Ill. Rev. Stat. ch. 30, § 22 (1959); Mich. Stat. Ann. § 26.528 (1953); Wis. Stat. § 235.22 (Supp. 1962).

<sup>89</sup> See *Carney v. Hopple's Heirs*, 17 Ohio St. 36 (1867); 1 Beale, Conflict of Laws § 8.1 (1935); Dicey, Conflict of Laws 59 (6th ed. 1949).

<sup>90</sup> See *Nichols v. Mase*, 94 N.Y. 160 (1883); *Farmers & Mechanics Nat'l Bank v. Loftus*, 133 Pa. 97, 19 Atl. 347 (1890); *Cheshire, Private International Law* 559 (3d ed. 1947); *Story, Conflict of Laws* 379-80, 390 (5th ed. 1857).

Recent cases have rejected these notions, and today the forum normally applies the law of the situs of the subject matter at the time of transfer, regardless of whether the subject matter is "tangible" or "intangible."<sup>91</sup> It must be conceded that there is little basis in fact for holding that movables have no locality and follow their owner, but there is at least one instance where it might be appropriate to apply the law of the donor's domicile. A gift causa mortis is partially an inter vivos transfer and partially a disposition of property upon death; inter vivos delivery is necessary, but the gift is "revoked" if the donor survives his contemplated illness.<sup>92</sup> Since such gifts are made in contemplation of death and the donee's title does not become irrevocable until the donor dies, it is at least arguable that the conflicts rule should recognize such gifts as a disposition of property upon death. Succession to movables is generally governed by the law of the decedent's domicile at the time of his death,<sup>93</sup> and the validity of a gift causa mortis should be tested by the same rule. This argument has been accepted by some courts,<sup>94</sup> but the prevailing view characterizes such gifts as basically inter vivos in nature, and the law of the situs at the time of transfer is applied rather than that of the decedent's domicile at the time of death.<sup>95</sup>

### *Bank Accounts*

With surprising uniformity the courts have held that the validity and effect of a joint bank account, or a bank account in the depositor's name as trustee for another, are to be determined by the law of the place where the bank is located.<sup>96</sup> While this conclusion may be justified as a matter of commercial convenience and most contacts do in fact center around the bank, the rationale to be used is somewhat uncer-

<sup>91</sup> *United States v. Guaranty Trust Co.*, 293 U.S. 340 (1934) (intangible); *Warner v. Florida Bank & Trust Co.*, 160 F.2d 766 (5th Cir. 1947) (intangible); *Weissman v. Banque de Bruxelles*, 254 N.Y. 488, 173 N.E. 835 (1930) (intangible); *Goetschius v. Brightman*, 245 N.Y. 186, 156 N.E. 660 (1927) (tangible). *But cf. Morson v. Second Nat'l Bank*, 306 Mass. 588, 29 N.E.2d 19 (1940); *Gidden v. Gidden*, 176 Miss. 93, 167 So. 785 (1936).

<sup>92</sup> See *Brown*, *Personal Property* §§ 52, 55 (2d ed. 1955).

<sup>93</sup> See materials cited note 23 *supra*.

<sup>94</sup> *Gidden v. Gidden*, *supra* note 91 (*semble*); *Re Craven's Estate* [1937] 3 All E.R. 33 (Ch.).

<sup>95</sup> *O'Neil v. First Nat'l Bank*, 43 Mont. 505, 117 Pac. 889 (1911); *Emery v. Clough*, 63 N.H. 552, 4 Atl. 796 (1885); *In re Korvine's Trusts*, [1921] 1 Ch. 343; *Lalive, The Transfer of Chattels in the Conflict of Laws* 26-29 (1955); *Restatement* § 254a.

<sup>96</sup> *Delaney v. Eddy*, 188 F. Supp. 780 (D. Mass. 1960); *Cutts v. Najdrowski*, 123 N.J. Eq. 481, 198 Atl. 885 (E. & A. 1938); *Wynne v. Wynne*, 69 R.I. 229, 33 A.2d 173 (1943); *Sloan v. Jones*, 192 Tenn. 400, 241 S.W.2d 506 (1951); *Boyle v. Kempkin*, 243 Wis. 86, 9 N.W.2d 589 (1943). *Contra, In re Weinsteins' Estate*, 176 Misc. 592, 28 N.Y.S.2d 137 (Surr. Ct. 1941).

tain. Some courts have concluded that a contract was executed between the bank and the depositor and the situs of the bank is the place where the contract was made and to be performed.<sup>97</sup> Other cases have treated a joint bank account as an attempt to make an inter vivos gift, thus calling for application of the law of the place where the transfer was made.<sup>98</sup> In cases involving deposits "in trust" for the benefit of the depositor or another, the location of the bank has been considered to be the domicile of the trustee and the situs of the trust corpus.<sup>99</sup> Since these several paths lead to a reasonable conclusion, the one selected is perhaps of little consequence.

### Insurance

Most questions relating to life insurance policies issued by legal reserve companies are resolved by applying the law of the place where the contract was made, which is usually held to be the state where the applicant was domiciled when the policy was delivered.<sup>100</sup> The law of the place of making has been applied to resolve the following issues: insurable interest,<sup>101</sup> the right to change beneficiary,<sup>102</sup> the method for changing beneficiary,<sup>103</sup> and interpretation of the terms designating beneficiary.<sup>104</sup> Even though these cases continue to speak in terms of traditional contract rules, life insurance is recognized as a contract of

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<sup>97</sup> *In re Kugel's Estate*, 192 Misc. 61, 78 N.Y.S.2d 851 (Surr. Ct. 1948); *Sloan v. Jones*, *supra* note 96.

<sup>98</sup> *Kelly v. Kelly*, 134 N.J. Eq. 316, 35 A.2d 618 (Prerog. Ct. 1944).

<sup>99</sup> *Boyle v. Kempkin*, *supra* note 96.

<sup>100</sup> *Mutual Life Ins. Co. v. Simon*, 151 F. Supp. 408 (S.D.N.Y. 1957); *Gray v. Aetna Life Ins. Co.*, 178 Tenn. 88, 156 S.W.2d 391 (1941); *Carnahan, Conflict of Laws and Life Insurance Contracts* §§ 15, 43 (2d ed. 1958); *Restatement (Second), Conflict of Laws* § 346h (Tent. Draft No. 6, 1960).

<sup>101</sup> *Peoples Life Ins. Co. v. Whiteside*, 94 F.2d 409 (5th Cir. 1938); *Gray v. Penn Mut. Life Ins. Co.*, 5 Ill. App. 2d 541, 126 N.E.2d 409 (1955); *Western Life Indem. Co. v. Rupp*, 147 Ky. 489, 144 S.W. 743 (1912), *aff'd*, 235 U.S. 261 (1914).

<sup>102</sup> *New York Life Ins. Co. v. Walls*, 124 F. Supp. 38 (N.D. W. Va. 1954); *Continental Assur. Co. v. Conroy*, 111 F. Supp. 370 (D.N.J. 1953).

<sup>103</sup> See, e.g., *Metropolitan Life Ins. Co. v. Haack*, 50 F. Supp. 55 (W.D. La. 1943); *Hoskins v. Hoskins*, 231 Ky. 5, 20 S.W.2d 1029 (1929).

<sup>104</sup> *Knights Templars & Masonic Mut. Aid Ass'n v. Greene*, 79 Fed. 461 (C.C.S.D. Ohio 1897); *Plaut v. Mutual Life Ins. Co.*, 16 Ohio C.C. Dec. 499 (1899); *Goodrich, Conflict of Laws* § 112 (3d ed. 1949). Professor Carnahan has suggested that distribution of proceeds payable to the insured's "estate" should be governed by the law of the insured's domicile at the time of death, rather than by the laws of his domicile when the contract was made. *Carnahan, op. cit. supra* note 100, § 69. In *Knights Templars & Masonic Mut. Aid Ass'n v. Greene*, *supra* at 465, the court applied the law of the place of contracting to interpret the word "heirs," but commented that "... the language is to be treated as of a testamentary character, and is to receive, as nearly as possible, the same construction as if used in a will under the same circumstances."

adhesion and the courts tend to apply traditional rules in such a way as to select the law of a state which is most favorable to the insured, provided that state has substantial contact with the policy involved.<sup>105</sup> This attitude is best illustrated by comparing cases where a choice of law clause in the policy is enforced if it calls for application of law which is favorable to the insured,<sup>106</sup> with cases where the clause is ignored or held to be invalid if it requires application of the law of a state which gives the insured less protection than he would enjoy under the law of another appropriate jurisdiction.<sup>107</sup>

The choice of law rule applied in cases of fraternal benefit insurance policies is not nearly as flexible. Most questions relating to the rights of individual members in the benefit association are determined by the law of the state where the association is organized.<sup>108</sup> The Supreme Court has added its support to this rule by holding that the full faith and credit clause compels this result in many instances.<sup>109</sup> By applying the law of the state of organization, the insured is protected in the sense that the rights of each individual member are uniform and relatively stable. However, this rule provides maximum protection for the insured only if it is assumed that the internal law of the state of organization is so designed. If we accept the proposition that conflict of laws rules should favor the insured under his contract of adhesion, it is perhaps regrettable that the flexibility evident in cases involving legal reserve companies has been restricted when a fraternal benefit policy is in issue.

### CONCLUSION

There are three primary methods whereby an estate planner may partially or completely control conflict of laws problems. The first is a careful drafting of all inter vivos and testamentary instruments so as to satisfy the law of all states having some present or potential contact with the transaction. This possibility has greatest utility in regard to

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<sup>105</sup> Carnahan, *op. cit. supra* note 100, § 60; Restatement (Second), Conflict of Laws § 346h, comment a (Tent. Draft No. 6, 1960).

<sup>106</sup> Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co., 72 Fed. 413 (6th Cir. 1896); Missouri State Life Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S.E. 93 (1907); Jones v. New York Life Ins. Co., 32 Okla. 339, 122 Pac. 702 (1912).

<sup>107</sup> See, e.g., New England Mut. Life Ins. Co. v. Olin, 114 F.2d 131 (7th Cir. 1940); Mutual Life Ins. Co. v. Mullen, 107 Md. 457, 69 Atl. 385 (1908).

<sup>108</sup> Kendrick v. Sovereign Camp, W.O.W., 57 Ariz. 458, 103 P.2d 463 (1945); Styles v. Byrne, 89 Mont. 243, 296 Pac. 577 (1931); Modern Woodmen of America v. Myers, 99 Ohio St. 87, 124 N.E. 48 (1918).

<sup>109</sup> Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947); Sovereign Camp v. Bolin, 305 U.S. 66 (1938); Modern Woodmen of America v. Mixer, 267 U.S. 544 (1925); Supreme Council of Royal Arcanum v. Green, 237 U.S. 531 (1915).

avoiding formal defects when drafting wills and deeds. The second method for avoiding conflicts problems is to locate assets so as to reduce the number of contacts with different states. The location of assets is frequently beyond the control of the estate planner, and in many instances is practically infeasible or financially inadvisable. Nevertheless, this appears to be the only effective device for avoiding the perplexing problem of double taxation of intangible personal property. The third possibility is to add an express choice of law clause to any inter vivos or testamentary instrument. In many of the areas considered in this study, the courts have expressed a willingness to apply the law of the state designated in the instrument involved, providing the state selected has some substantial connection with the transaction and the law of that state does not violate some strong public policy of the state to which reference would be made under the common-law rules. The most significant areas where the courts have given effect to a private selection of governing law are: inter vivos and testamentary trusts and powers of appointment of movables, testamentary dispositions of movables, allocation of federal estate taxes, and life insurance. Even in cases where the transaction does not fall within one of these categories, it is advisable for the draftsman of any inter vivos or testamentary instrument to include a clause which expressly selects governing law from among those states having some reasonable connection with the transaction.